In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 684

THE SUPERIOR OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a–40a) is reported at 322 F. 2d 601.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1963 (Pet. App. 41a). A timely petition for rehearing was denied on September 25, 1963 (Pet. App. 40a) and the petition for a writ of certiorari was filed on December 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

716-843—63

QUESTIONS PRESENTED

The Federal Power Commission summarily rejected an application for a certificate of public convenience and necessity filed by petitioner, a gas producer, because it was based upon a contract containing price-changing provisions of a kind which the Commission had proscribed by regulation as contrary to the public interest. The questions presented are:

1. Whether the Commission may, as held by the court below, exercise its rulemaking power in order to prohibit contractual arrangements (including spiral escalation clauses, favored-nation provisions and other types of indefinite pricing) which it finds incompatible with the public interest.

2. Whether the Commission's regulations, which limit the types of price-changing provisions that may be included in producer contracts, are reasonable insofar as they proscribe favored-nations and unlimited-price-redetermination clauses of the kind included in petitioner's rejected filings.

STATUTE INVOLVED

Pertinent provisions of the Natural Gas Act and of the Commission's regulations are set forth in the petition at pages 45a–69a.

STATEMENT

The decision below affirmed the Commission's order rejecting, without hearing, an application for a certificate of public convenience and necessity filed by petitioner, an independent producer of natural gas, and the related proposed rate schedule, which were

based on an April 9, 1962, contract containing price-changing provisions other than those allowed by the Commission's regulations (Pet. App. 1a–5a, 40a).

The Commission's Regulations under the Natural Gas Act, Section 154.91 *et seq.*, as amended (18 C.F.R. (Cum. Supp. 1963) 154.91 *et seq.*), provide that independent producers subject to the agency's jurisdiction shall file their contracts as rate schedules. Section 154.93 provides in part:

> * * * That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:
>
> (a) Provisions that change a price in order to reimbuse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;
>
> (b) Provisions that change a price to a specific amount at a definite date; and
>
> (c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question * * *.

This language was added by Order No. 232, issued March 3, 1961 (Pet. App. D, pp. 53a–58a; 25 FPC 379; 26 Fed. Reg. 1983), as amended by Order No. 232A, issued March 31, 1961 (Pet. App. E., pp. 59a–62a; 25 FPC 609; 26 Fed. Reg. 2850).

Section 154.93 of the regulations further provides that "any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions" described above "shall be rejected." Similarly, Section 157.25 provides that an independent producer's application for a certificate of public convenience and necessity "shall be rejected" if any contract submitted in support of it contains the forbidden provisions. These provisions were added to the regulations by Order No. 242, issued February 8, 1962 (Pet. App. F, pp. 63a–67a; 27 FPC 339; 27 Fed. Reg. 1356).[1]

The April 9, 1962, agreement incorporated by reference the provisions of a 20-year contract entered into by Superior and El Paso in 1958. The pricing terms adopted by the 1962 agreement called for an initial price of 20 cents per Mcf for the first five years commencing with the date of initial delivery under the original contract, 21 cents per Mcf for the second five-year period, 22 cents per Mcf for the third five-year period, 23 cents for the fourth five-year period, and

[1] The procedural background of these regulations is described at pp. 2–8 of the Commission's petition in *Federal Power Commission* v. *Texaco Inc., et al.*, No. 386, this Term, certiorari granted on November 12, 1963, 375 U.S. 902, to which we respectfully refer the Court.

24 cents per Mcf thereafter if the contract is still in effect. The initial price was reduced to 17.7 cents per Mcf, in accordance with a condition attached to the certificate issued by the Commission for sale under the 1958 contract. In addition to these permissible fixed-price escalation provisions, the agreement also provided for a price redetermination for each five-year period after the first, and included a so-called favored-nation clause providing that El Paso would never pay petitioner less than the price it was paying "others for comparable gas delivered under comparable conditions" within a specified area. (Pet. App. 3a–4a.)

After the Commission's rejection based on the regulations, petitioner sought rehearing, urging that the summary rejection of its applications was invalid because (1) the regulations upon which the Commission relied were invalid, (2) the regulations and the rejection order were improperly issued without opportunity for hearing, and (3) in any event, the Commission cannot, even in a rate or certificate proceeding, modify provisions of contracts which "do not affect the initial 'rate charge or classification'" (R. 126). Petitioner recognized that its contract contained proscribed price-changing provisions and it made no request for a waiver of the regulations.

The Court below affirmed, holding that the Commission had properly exercised its substantive powers by rule-making and that it had a reasonable basis for proscribing price-changing provisions of the kind involved here.

DISCUSSION

This case deals with the same regulations involved in *Federal Power Commission* v. *Texaco, Inc.*, No. 386, in which certiorari was granted on November 12, 1963, 375 U.S. 902. As we pointed out in the supplemental memorandum to our petition in No. 386, there is a direct and express conflict between the *Texaco* decision and the decision in the instant case as to the Commission's power to proceed by rule or regulation (Question 1, *supra*). As to this issue, therefore, there is no question as to the propriety of granting the writ.

Nor do we oppose consideration of the further question decided below, but not reached in Texaco, *i.e.*, whether the rules, as applied, were a reasonable exercise of the Commission's authority. To be sure, as to this issue there is no conflict at the present time. But the reasonableness of the rules presents a question related to the scope of the Commission's rule-making power. Moreover, as noted in our petition in No. 386, the regulations in question are nationwide in their application and constitute an important element in the Commission's effort to achieve effective regulation of producers. Finally, we point out that the same issue is involved in litigation in the Fifth and Tenth Circuits, and that a definitive resolution by this Court would relieve uncertainty and contribute to the sound administration of the Natural Gas Act.

CONCLUSION

For the foregoing reasons, we do not oppose certiorari. We also suggest that, if the writ is granted, it would be appropriate to set the case for argument with No. 386.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
RALPH S. SPRITZER,
Assistant to the Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
PETER H. SCHIFF,
Attorney,
Federal Power Commission.

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